



Advocacy: the voice of small business in government

**Testimony of
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*United States Senate Committee on Small Business and
Entrepreneurship*

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**Topic: An Examination of Proposed Environmental
Regulation's Impacts on America's Small Businesses**

Chairman Vitter, Ranking Member Shaheen, Members of the Committee, I am honored to be here today to present testimony to you on behalf of the Office of Advocacy of the U. S. Small Business Administration about the Environmental Protection Agency (EPA) and the Army Corps of Engineer's (the Corp) proposed rule on the definition of "Waters of the United States" under the Clean Water Act¹.

As Director of Interagency Affairs, I manage a team of attorneys that works with federal government agencies during the rulemaking process to reduce regulatory burdens on small businesses and implements the requirements of the Regulatory Flexibility Act (RFA). The RFA requires federal agencies to consider the effects of their proposed rules on small businesses and other small entities, including small governments and small nonprofits. The Office of Advocacy is an independent office within the SBA that speaks on behalf of the small-business community before federal agencies, Congress, and the White House. The views in my testimony do not necessarily reflect the views of the Administration or the SBA, and this statement has not been circulated to the Office of Management and Budget for clearance.

Background on the Clean Water Act

The Clean Water Act (CWA) was enacted in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."¹ The CWA accomplishes this by eliminating the "discharge of pollutants into the navigable waters."² The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."³ Existing regulations currently define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.⁴

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a "water of the United States."⁵ The EPA generally administers these permits; however, EPA and the Corps jointly administer and enforce certain permit programs under the Act.⁶

The extent of the Act's jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water. The courts have left much uncertainty regarding what constitutes a "water of the United States." Such uncertainty has made it difficult for small entities to know which waters are subject to CWA jurisdiction and permitting.

¹ 33 U.S.C. § 1251(a) (1972).

² Id. at § 1251(a)(1).

³ Id. at § 1362(7).

⁴ 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

⁵ 33 U.S.C. §§ 1311(a), 1342, 1344.

⁶ Id. at § 1344.

To address this uncertainty, the EPA and the Corps proposed this rule which would revise the regulatory definition of “waters of the United States” and would apply to all sections of the Clean Water Act. The proposed rule defines “waters of the United States” within the framework of the CWA as the following seven categories:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.⁷

Advocacy Involvement

For several years EPA and the Corps have been working on a proposal, first as a guidance document and subsequently a published rule, that would clarify the CWA’s jurisdiction; that is to say when water would be deemed a water of the U.S. for purposes of the CWA. Advocacy has been engaged with EPA, the Corps, and small entities on this issue from its inception, including holding roundtable discussions in Washington, DC and Los Angeles, CA in July and August of 2014 respectively. In addition, the office participated in two small entity meetings held by EPA and the Corps in 2011 and 2014. Advocacy has met with and spoken to numerous individual small entities concerned about the effects of this rule over the last four years. These small entities represent many different industries including but not limited to agriculture, real estate, home builders, cattlemen, farmers, and the mining industries. Feedback from these small entities has remained consistent: the proposed rule as promulgated by EPA and the Corps is an expansion of jurisdiction that will increase the costs to small businesses.

The Agencies Should Have Conducted a SBREFA Panel

Under Section 609(b) of the RFA, EPA is required to conduct Small Business Regulatory Enforcement Act panels (SBREFA panels) when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses.⁸

⁷ 79 *Fed. Reg.* at 22,198.

⁸ 5 U.S.C. § 609 (b).

SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

The EPA and the Corps have certified that the proposed rule will not have a significant economic impact on a substantial number of small businesses. They argue that the proposed rule does not expand jurisdiction but rather narrows jurisdiction of the CWA as compared to current regulation.⁹ As a result, the agencies argue, the proposed rule will not affect small entities to a greater degree than the existing regulations.¹⁰

Advocacy believes that the agencies are incorrect in relying upon the existing regulations, which have been abrogated by the Supreme Court in two separate opinions and are not currently used as the basis for making jurisdictional determinations.

Advocacy believes that the proper baseline from which to assess the rule's economic impact is the guidance document issued in 2008 which is currently used as the basis for making jurisdictional determinations. Guidance from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.¹¹ It states that "The baseline should be the best assessment of the way the world would look absent the proposed action."¹² The Corps and EPA issued the guidance document in 2008 which sought to bring jurisdictional determinations in line with the Supreme Court decisions concerning CWA jurisdiction.¹³ It is this guidance document that serves as the current basis for making jurisdictional determinations, not the 1986 regulation. Using an obsolete baseline diminishes the effects of this rule.

The Rule Will Have a Significant Economic Impact on Small Businesses

The small entities that Advocacy has spoken with have indicated that the rule will impose significant costs. Advocacy notes that the economic analysis for the proposed rule confirms that it may result in an increase in jurisdiction that will lead to greater costs stating, "A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would

⁹ Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).

¹⁰ *Id.*

¹¹ Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).

¹² *Id.*

¹³ Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>.

intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits.”¹⁴

An example of the potential costs actually comes directly from the economic analysis that accompanied the proposed rule. The EPA and the Corps estimate that CWA 404 permit costs would increase between \$19.8 million and \$52.0 million dollars annually, and they estimate that section 404 mitigation costs would rise between \$59.7 million and \$113.5 million annually.¹⁵ The analysis further states that the amounts discussed do not reflect additional possible costs such as the increases associated with as Section 402 permitting or Section 311 oil spill prevention plans, and the analysis is not representative of the changes that may occur with respect to Section 402 and Section 311 permitting.¹⁶ Thus, the agency states that there will be costs that are not accounted for in the economic analysis but leaves small entities without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

Small entities have provided anecdotal evidence of how this proposed rule may impose significant economic costs. For example, small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a “single and complete” project that results in less than a half acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.¹⁷ Currently, each crossing of a road over a water of the U.S. is treated as a “single and complete” project. The proposed rule creates large areas in which NWP 12 may not be able to be used at all. Under this proposed rule, waters in the same riparian area and floodplain become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area and floodplain are treated as one interconnected water of the U.S., it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual permits. This is a direct cost imposed solely as a result of the changes to the definition of the term “waters of the United States” proposed in this rule.

The Rule Imposes Direct Costs on Small Entities

Moreover, small entities disagree with the agencies’ contention that the costs of this rule would be indirect, therefore putting these costs beyond the scope of the RFA.

The courts have ruled that the RFA requires analysis of direct cost effects only. Under the RFA, agencies are not required to analyze indirect effects to small entities, and where all effects on small entities are indirect certification may be appropriate.

¹⁴ Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 13 (March 2014). Advocacy disagrees with the agencies’ assertion that this cost is indirect (see above).

¹⁵ Id. at 16.

¹⁶ Id. At 12.

¹⁷ Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

The agencies base certification upon two cases which generally hold that agencies may certify when all the effects of a rule would be indirect *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*¹⁸ and *American Trucking Associations, Inc., v. EPA*¹⁹. These cases discuss the circumstances under which the effects of a rule may be found to be indirect.

In *Mid-Tex*,²⁰ the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. The issue raised in this case was whether or not the agency had improperly certified the rule because it failed to consider the impact on the small business customers of those utilities. The court concluded that certification was appropriate because any costs borne by the customers of the utility companies would be indirect.

In *Mid-Tex*, the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. As a result, they will be subject to the application of the proposed definition and the impacts arising from its application.

In *American Trucking*,²¹ the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. By statute, the rules required EPA to approve any state plan that met the standards; EPA could not reject a plan based upon its view of the wisdom of a state's choices.²² Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.²³

Contrary to *American Trucking*, the WOTUS rule defines the scope of jurisdiction of the Clean Water Act and does not leave implementary discretion to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in a jurisdiction, then leaves the Corps or states to determine the exact definition of waters of the United States to be applied in particular instances. This rule establishes the definition and all small entities are bound by it.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited

¹⁸ *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC)*, 773 F.2d 327, 342 (D.C. Cir. 1985).

¹⁹ *American Trucking Associations v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999).

²⁰ 773 F.2d at 342.

²¹ 175 F.3d 1027 (D.C. Cir. 1999).

²² *Id.* at 1044.

²³ *Id.* at 1045.

economic analysis that the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. We believe that the agencies' certification of no small business impact is inappropriate in light of this information. Advocacy also has significant reservations about the agencies' determination that this rule only has indirect effects on small businesses. Advocacy has advised the agencies to withdraw the rule and conduct a SBREFA panel prior to promulgating any final rule on this issue.